

Attachment 5

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Southeastern Illinois Electric :
Cooperative, Inc. :
-vs- :
Central Illinois Public Service :
Company : 89-0420
Complaint under Electric Supplier:
Act regarding service in Franklin:
County, Illinois. :

ORDER

By the Commission:

On October 27, 1989, Southeastern Illinois Electric Cooperative, Inc. ("Southeastern" or "Complainant") filed a verified Complaint with the Illinois Commerce Commission ("Commission") against Central Illinois Public Service Company ("CIPS" or "Respondent") requesting that the Commission find and order that Southeastern is entitled to provide both temporary and permanent electrical service to Old Ben Coal Company ("Old Ben"), and that CIPS is not so entitled and should be prohibited from providing electric service to Old Ben in Southeastern's territory as designated under a Commission approved Partial Service Area Agreement between Southeastern and CIPS.

Pursuant to notice duly given as required by law and by the rules and regulations of the Commission, hearings were held in this matter before a duly authorized Hearing Examiner of the Commission at its offices in Springfield, Illinois on November 21, 1989 and January 3, 1990. Appearances were entered by counsel for Complainant and Respondent, respectively, and by a member of the Commission's Engineering Department. During the course of this proceeding Complainant withdrew its request for temporary service. The parties stipulated to certain facts and also presented evidence. At the conclusion of the hearing on January 3, 1990, the record was marked "Heard and Taken." Briefs were filed by CIPS, Staff and Southeastern on January 4, January 5 and January 8, 1990, respectively. CIPS filed its Reply Brief on January 8, 1990 and Southeastern filed its Reply Brief on January 11, 1990.

The Hearing Examiner's Proposed Order was mailed by the Commission's Chief Clerk to all persons whose names appeared on the service list maintained for this docket under a cover letter dated January 18, 1990. A Brief on Exceptions was filed on behalf of Southeastern on February 1, 1990, and a Reply to Complainant's Brief on Exceptions was filed on behalf of CIPS on

February 9, 1990. The Exceptions and Reply have been considered.

Statement of Facts

Old Ben Coal Company developed Mine No. 24, an underground coal mine, in Franklin County, Illinois, in 1962. On July 1, 1965, CIPS and Old Ben entered into an Electric Service Agreement which required Old Ben to take and CIPS to furnish all electric power required by Old Ben in the operation of its coal mines. The record shows that CIPS has provided all electric service requirements for Mine No. 24, as the mine's underground operations changed, through a series of successive electric service agreements that reflect the changed circumstances, for a continuous and uninterrupted period over 24 years.

On June 26, 1973, Southeastern and CIPS entered into a Partial Service Area Agreement ("PSAA") which was submitted to and approved by the Commission on May 8, 1974 in Docket No. ESA 159. The PSAA provides, in pertinent part, as follows:

- "1. The parties hereto covenant and agree that Cooper shall be entitled exclusively to serve all consumers with their electric service requirements in the area designated as SIEC on the map hereto attached as Appendix 1A and Utility shall be entitled exclusively to serve all consumers with their service requirements in the area designated as CIPS on said Appendix 1A.

* * * *

3. Nothing herein contained shall prohibit either Cooperative or Utility from hereafter constructing new lines and thereafter maintaining the same, when necessary, through the service area or areas of the other, provided no service be extended from such lines, or any of them, to any consumers except those consumers the constructing party is otherwise entitled to serve."

Old Ben has requested additional electric service to its Mine No. 24 at a point identified as Drill Hole No. 7 in Franklin County, Illinois; the requested service gave rise to this Complaint proceeding. The parties have stipulated that each stands ready, willing and able to provide electric service pursuant to Old Ben's request for delivery of 7.2 KV service at Drill Hole No. 7.

Position of the Parties

Southeastern contends that it has the exclusive right to provide the electrical service requirements to a consumer of

electricity within its delineated area pursuant to the PSAA and specifically with respect to Old Ben's Drill Hole No. 7. Southeastern asserts that the PSAA existing between it and CIPS is controlling in this case.

CIPS claims that: (1) its existing contractual relationship, under which it provided the electric requirements for Mine No. 24 for a continuous period of over 24 years, constitutes a contract in existence on July 2, 1965, the effective date of the Illinois Electric Supplier Act ("Act") within the meaning of Section 5(b) of the Act; and (2) the exception in paragraph 3 of the PSAA authorizing the extension of lines to serve consumers a supplier is "otherwise entitled to serve" incorporates the service entitlements provided in Section 5 of the Act, including CIPS' Section 5(b) contractual right and obligation to provide the electric requirements of Mine No. 24.

Conclusions

In deciding service area disputes, the Commission derives its jurisdiction from the Electric Supplier Act and looks to service area agreements between electric suppliers, approved by the Commission pursuant to Section 6 of the Act. Here the PSAA between Southeastern and CIPS was entered into on June 26, 1973 and was approved by the Commission on May 8, 1974. The Act contemplates that relations between electric suppliers should be governed by such agreements to the exclusion of the Act, except insofar as the agreement incorporates the Act. Rural Electric Convenience Coop. v. Illinois Commerce Commission, 75 Ill. 2d 142, 25 Ill. Dec. 794, 796, 387 N.E. 2d 670 (1979). Therefore, the PSAA between Southeastern and CIPS is controlling in this docket, and resolution of this dispute is a matter of contract interpretation.

The evidence shows that beginning in 1962, CIPS had provided service to Old Ben for the construction of Mine No. 24 and, since 1965, has consistently provided service for the operation of this mine pursuant to contract. The service requirements of Mine No. 24 are those of a single electric load unit with portions of the load moving and relocating as mining operations progress. The service now required to Mine No. 24 at Drill Hole No. 7 is a portion of the same load Respondent has served for 27 years. During those 27 years, CIPS has provided service to Mine No. 24 at service points located in the area designated in Appendix 1A of the PSAA as belonging to CIPS. As mining operations progressed, Old Ben had installed its own distribution lines to serve the operation. Mine No. 24 has moved its operations and part of its service requirements into the area designated in the Agreement as belonging to Southeastern. Old Ben is unable to increase the capacity of the distribution lines it presently has

installed in Mine No. 24 to meet its requirements and therefore requires an additional connection from the surface to Drill Hole No. 7. Both electric service suppliers stand ready, willing and able to provide service to Mine No. 24 at this drill point.

The PSAA provides in paragraph (1) that CIPS "shall be entitled exclusively to serve all customers with their service requirements in the area designated as CIPS on . . . Appendix 1A."

However, paragraph (3) prohibits the construction of "new lines . . . through the service area or areas of the other [to provide service] . . . to any consumers except those consumers the constructing party is otherwise entitled to serve." In order to resolve this dispute the Commission must interpret the relevant contractual provisions to give effect to the intentions of the electric suppliers as they may govern the matter in dispute.

The question becomes, did the parties intend that CIPS could extend its service to Old Ben's expanded operations as permissible service to "a consumer [CIPS] is otherwise entitled to serve." There is no dispute that CIPS is entitled to service its customer, Old Ben's Mine No. 24, from its previous service point located in CIPS' service area. As to Drill Hole No. 7, the Commission is of the opinion that a plain and reasonable reading of paragraph (3) of the PSAA indicates that the parties intended that each was authorized to extend service through the area or areas of the other in order to provide electrical service to the premises of a customer of the contracting supplier existing as of the date of the execution of the PSAA. Therefore, CIPS has a right to supply all of the electric service requirements Old Ben has for the operation of its Mine No. 24, including Drill Hole No. 7.

If the Commission were to adopt Complainant's position, the Commission would do violence to the expressed intention of the parties as it is expressed in the PSAA, in contradiction of the public policy stated in the Act.

The Commission, having considered all of the evidence contained in the record of these proceedings and being fully advised in the premises, is of the opinion and finds that:

- (1) Southeastern Illinois Electric Cooperative, Inc. is an Illinois not-for-profit corporation, engaged in the business of transmitting, distributing, furnishing and selling electric energy to its customers within the State of Illinois, and is an electric supplier as defined in Section 3.5 of the Act;

- (2) Central Illinois Public Service Company is an Illinois corporation engaged in the generation, transmission, distribution and sale of electric energy to its customers within the State of Illinois, is a public utility within the meaning of the Illinois Public Utilities Act and is an electric supplier as defined in Section 3.5 of the Act;
- (3) the Commission has jurisdiction over the parties hereto and of the subject matter hereof;
- (4) the statements of fact set forth in the prefatory portion of this Order are supported by the evidence and the record and are hereby adopted as findings of fact;
- (5) on July 1, 1965, Respondent and Old Ben Coal Company entered into an electric service agreement obligating CIPS to furnish and Old Ben to take all electric power required for the operation of Old Ben's Mine No. 24;
- (6) Mine No. 24 constitutes a consumer CIPS is "otherwise entitled to serve" within the meaning of paragraph 3 of the Partial Service Area Agreement;
- (7) CIPS should be authorized to provide the additional electric service required by Mine No. 24 at Drill Hole No. 7 in Franklin County, Illinois.

IT IS THEREFORE ORDERED that Central Illinois Public Service Company be, and it is hereby, exclusively authorized to provide electric service to Old Ben Coal Company's Mine No. 24 at Drill Hole No. 7 in Franklin County, Illinois.

By order of the Commission this 11th day of April, 1990.

(SIGNED) TERRENCE L. BARNICH

Chairman

(S E A L)

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April 30, 1990, concurring opinion to the Order entered by
the Commission on April 11, 1990 filed by Commissioner
Calvin K. Manshio.

Commissioner Manshio, concurring:

My concurrence is not based on the facts of this
particular case, but on the Electric Suppliers Act (ESA),
which a majority of this Commission believes, requires the
analysis found in this case.

Black letter law, under our system of jurisprudence, is
subject to evolution over a period of time. This is the
basis of our common law system. Courts and judges interpret
language and meaning in light of changes in circumstances.
Likewise, and more importantly, regulatory bodies are
charged with responding to changes in circumstances. Our
recent decisions on disputes between electric cooperatives
and investor owned utilities have not kept pace with the
times and have not responded to the changes in circumstance
represented by the emergence of consumer preference and
their ability to effectuate their choice through the
investment of time, money, and effort.

In the beginning, electric companies could pick and
choose the areas into which they wished to provide service.
Service was then effectuated through a franchise agreement
and by a certificate of public convenience and necessity.
In remote areas the lack of electric service was addressed
through the Rural Electrification Act. Over the course of
time, border disputes developed between electric
cooperatives and investor owned utilities. These conflicts
involved new electric service and/or extension of service to
current customers. Absent from the debate were the rights
of customers to determine their supplier. Section 8 of the
ESA states that the Commission may consider customer
preference in an ESA dispute decided under that section.
There are no Commission decisions in which the Commission
has said it will decline to consider customer preference

under Section 8. What has happened is that the Commission has used the principle established in Rural Electric Co-op v. ICC, 387 N.E.2d 670, wherein the Supreme Court of Illinois determined that "once service area agreements are properly approved by the Commission, such agreements control rights of parties thereto, to the exclusion of the Act, except insofar as the agreement incorporates the Act." The Commission's recent decisions in the ESA cases have tended to focus on a very legalistic interpretation of the service area agreements involved and therefore, the Section 8 criteria have not been brought into play. It is the inability of the Commission to take a public interest view of the interpretation of service area agreements which has led to the effective repudiation of consumer preference in such cases as ESA 239, ESA 249 etc. See dissenting opinions in ESA 239, 243, 249 and 252.

The mere fact that pervasive regulation exists at the state level does not exempt electric cooperatives and investor owned utilities from compliance with federal antitrust provisions. In Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973) the Supreme Court held. "Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." Utilities remain accountable for abuse of monopoly power by engaging in anticompetitive conduct.

Conduct that would otherwise violate federal antitrust laws may nevertheless be permissible when done under the aegis of the State. Parker v. Brown, 317 U.S. 341 (1943). For private conduct to qualify for immunity under the state action doctrine, the challenged restraint must be (1) "one clearly articulated and affirmably expressed as state policy," and (2) "the policy must be 'actively supervised' by the State itself." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

In those cases where customers exist at the borders of electric suppliers' territories, this Commission should not ignore customer preference or, as in ESA 243, actually presume to tell a customer what he cannot do with the electricity once he gets it. A state legislature by statute may exempt competition. Regulators, however, should go beyond strict adherence to contractual analysis in situations involving customer preference and conduct outside of agreements in which they did not participate. Since this case does not involve such customer action, I concur to express my views.